

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF ALASKA**

**FLOWERVE CORPORAION and** )  
**FLOWERVE MANAEMENT CO.,** )  
) )  
**Plaintiffs,** ) **A03-242 CV (JWS)**  
) )  
**vs.** ) **ORDER FROM CHAMBERS**  
) )  
**PRO-SEAL, INC. individually** ) **[Re: Motion at docket 4]**  
**and d/b/a PRO-SEAL SERVICES** )  
**GROUP, INC., SETH SHORT, and** )  
**RANDY QUINCY,** )  
) )  
**Defendants.** )

## I. MOTION PRESENTED

At docket 4, plaintiffs Flowserve Corporation and Flowserve Management Co. move for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 to enjoin defendants and their agents from making certain representations and from engaging in certain activities relating to Flowserve products. Defendants Pro-Seal, Inc., Pro-Seal Group, Inc., Seth Short, and Randy Quincy oppose the motion. Briefing of the motion was completed on December 4, 2003. No party has requested oral argument, and oral argument would not assist the court.

## **II. BACKGROUND**

The facts are taken from admissions in the pleadings and from plaintiffs' affidavits. Although defendants' briefing includes assertions by counsel that are contrary to some of the facts in the affidavits, defendants failed to submit any competent evidence to support their version of the facts. The only affidavit submitted by defendants is from Seth Short and consists in its entirety of the following text: "Seth Short being first duly sworn, deposes and states he has read the Brief in Response to Motion for Preliminary Injunction. All statements of fact contained in the Brief are true to the best of his knowledge, information and belief." Mr. Short's affidavit contains no statement that he has personal knowledge concerning all of the factual assertions in defendants' brief. The affidavit merely recites that to the extent of Mr. Short's knowledge and information--the extent is not disclosed--he believes the facts to be true. Given the absence of any averment of personal knowledge of the facts, Mr. Short's affidavit may not be considered.<sup>1</sup>

Plaintiff Flowserve Management Company Co. owns the BW/IP®, BW SEALS®, and FLOWSERVE® registered trademarks and has licensed plaintiff Flowserve Corporation to use them.<sup>2</sup> Flowserve Corporation and its predecessors in interest have used the unregistered mark "P-50" in Alaska to identify mechanical seals since 1992.<sup>3</sup> In their complaint, plaintiffs seek to recover damages from defendants on a variety of claims, including trademark infringement and unfair competition under the Lanham Act<sup>4</sup> and various state law claims.<sup>5</sup> Plaintiffs also seek an injunction prohibiting defendants

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<sup>1</sup>Rule 602, FED. R. EVID. *Cf.* Rule 56(e) FED. R. CIV. P.

<sup>2</sup>Doc. 4, Affidavit of Robert L. Roberts, Jr.

<sup>3</sup>*Id.*

<sup>4</sup>15 U.S.C. § 1051, *et seq.*

<sup>5</sup>Doc. 1.

from representing that defendants' products or services are authorized by plaintiffs, prohibiting defendants' use of plaintiffs' registered trademarks and the unregistered "P-50" mark, and prohibiting defendants' use or disclosure of Flowserve Corporation's blueprints, engineering drawings, and other proprietary material.<sup>6</sup> Plaintiffs' motion at docket 4 seeks a preliminary injunction affording the relief sought in the complaint.

Defendant Pro-Seal, Inc. is a Michigan corporation which also does business under the name of Pro-Seal Group, Inc. and maintains a place of business at mile 64.5 of the Parks Highway in Willow, Alaska.<sup>7</sup> Defendants Seth Short and Randy Quincy are individuals who also have business addresses at mile 64.5 of the Parks Highway in Willow.<sup>8</sup> Short and Quincy are doing business in association with Pro-Seal.<sup>9</sup> Short and Quincy were formerly employed by a company named Stratco,<sup>10</sup> which was previously a distributor of Flowserve products in Alaska.<sup>11</sup> While Short and Quincy were with Stratco, they were given various detailed engineering drawings of Flowserve products for use in connection with Stratco's operations as a Flowserve distributor.<sup>12</sup> After Short and Quincy moved over to Pro-Seal, Pro-Seal began selling as Flowserve parts certain components which were not genuine Flowserve components, but could have been made using the Flowserve drawings given to Short and Quincy, including sleeves for two 4500 Seal Sets.<sup>13</sup> Pro-Seal has distributed mechanical seals using Flowserve's unregistered

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<sup>6</sup>*Id.*

<sup>7</sup>Doc. 1 ¶ 3 as admitted in Doc. 14 ¶ 3.

<sup>8</sup>Doc. 1 ¶¶ 4 and 5 as admitted in Doc. 14 ¶¶ 4 and 5.

<sup>9</sup>Doc. 4, Affidavit of Mathew Bender ¶ 4 (Short); Affidavit of Richard Matchett ¶ 15 (both Short and Quincy)

<sup>10</sup>Doc. 1 ¶ 17 as admitted in Doc. 14 ¶ 17; doc. 4, Affidavit of Fred Rathburn ¶ 3.

<sup>11</sup>Doc. 4, Affidavit of Richard Matchett ¶ 10; Affidavit of Fred Rathburn ¶ 3.

<sup>12</sup>Doc. 4, Affidavit of Richard Matchett ¶¶ 11- 14; Affidavit of Fred Rathburn ¶¶ 4-6.

<sup>13</sup>Doc. 4, Affidavit of Richard Matchett ¶ 15

"P-50" mark, other Flowserve product designations, and Flowserve's registered marks to Flowserve customers such as BP Alaska Exploration (Alaska) Inc. ("BP")<sup>14</sup> Defendants' distribution of these products has confused purchasers such as BP.<sup>15</sup> In addition, based on the record citations which accompany them and this court's review of the record, the facts asserted in paragraphs 9-21, 22, with the exception of the unequivocal statement that Stratco fired Short and Qunicy (it is undisputed that the relationship was terminated, but it is not clear on what terms), 23 and 24 of "Plaintiffs' Proposed Findings of Fact and Conclusions of Law In Support of Plaintiffs' Motion for Preliminary Injunction" ("Proposed Findings and Conclusions")<sup>16</sup> are adopted as correct statements of fact.<sup>17</sup>

### **III. STANDARD FOR ISSUANCE OF AN INJUNCTION**

Federal Rule of Civil Procedure 65 authorizes injunctive relief under certain specified conditions. As this court has previously noted, "[p]reliminary injunctive relief is appropriate when a plaintiff establishes (1) probable success on the merits and irreparable harm if relief is denied, or (2) that there are serious questions on the merits and the balance of hardship tips sharply in favor of plaintiff."<sup>18</sup> The test represents "a single continuum of concern which evaluates two factors that must always be considered: 'The likelihood of the plaintiff's success on the merits; and the relative balance of

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<sup>14</sup>Doc. 4, Affidavit of Richard Matchett, ¶¶ 3-9; Affidavit of Eric Grabber ¶¶ 3-4; Affidavit of Keith Jump ¶¶ 3-6 and Affidavit of Steve Rose ¶¶ 3, 5-7, and 9.

<sup>15</sup>Doc. 4, Affidavit of Matthew Bender PP 5-20; Affidavit of Eric Grabber ¶ 5.

<sup>16</sup>Doc. 11 at pp. 4-10.

<sup>17</sup>The court is not rejecting as incorrect other proposed findings of fact set out in the Proposed Findings and Conclusions, but, rather, does not explicitly adopt them at this time.

<sup>18</sup>*Rowe v. Burton*, 884 F. Supp. 1372, 1375 (D. Alaska 1994) (*citing Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 602 (9<sup>th</sup> Cir. 1991)).

potential hardships to the plaintiff, defendant, and public.”<sup>19</sup> Analysis is affected by the relative probability of success and potential hardship: “[t]he higher a plaintiff’s probability of success, the less the balance of hardship need tip in plaintiff’s favor to support issuance of an injunction.”<sup>20</sup>

#### **IV. DISCUSSION**

The undisputed facts show that plaintiffs have registered trademarks and one unregistered mark, the P-50 mark, which has long been used in Alaska to identify Flowserve products. The undisputed facts show that defendants have been involved in the distribution of non-Flowserve products which are labeled, packaged, and shipped in such a fashion that there is actual confusion in the marketplace as to whether Pro-Seal products are actually Flowserve products. The undisputed facts also give rise to a strong inference that defendants are making unauthorized use of plaintiffs’ drawings which were provided to Short and Quincy for use by Stratco.

This court adopts the legal conclusions set forth in paragraphs 1-3, 5, 8, and 12 of the Proposed Findings and Conclusions.<sup>21</sup> The court further finds that it is likely that the factual conclusions set forth in paragraphs 4, 6, 7, 9-11, 13, and 14 of the Proposed Findings and Conclusions are correct.<sup>22</sup>

Given the undisputed facts, the probability that plaintiffs can prove the factual conclusions mentioned in the preceding paragraph, and the substantive legal principles which govern, the court concludes that it is highly probable that plaintiffs will prevail on the merits. Moreover, customers’ purchase and use of counterfeit products may do irreparable harm to plaintiffs’ good-will in the market place. The injunction to be issued

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<sup>19</sup>*Id.* (quoting *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9<sup>th</sup> Cir. 1988)).

<sup>20</sup>*Id.*

<sup>21</sup>Doc. 11 at pp. 11-16.

<sup>22</sup>Doc. 11 at pp. 12-16.

will not prohibit defendants from marketing products or services so long as defendants do not represent that they are Flowserve products or services, so the balance of hardships tips in favor of plaintiffs. Finally, elimination of confusion in the marketplace would serve the public's interest. Plaintiffs meet the criteria for injunctive relief.

#### **V. CONCLUSION AND ORDER FOR REPORT**

For the reasons set out above, plaintiffs' motion for a preliminary injunction at docket 4 is **GRANTED**. An appropriate preliminary injunction will be issued as a separate document.

Based on its review of the file, the court concludes that this case is a good candidate for resolution through the use of alternative dispute resolution ("ADR") procedures. Counsel for the parties shall confer and on or before January 30, 2004, shall file a joint status report on what form of ADR the parties have agreed upon and when it will be conducted. If the parties agree that some form of ADR is appropriate, but cannot agree on which form or when to proceed, then the status report should contain an explanation of why the form or time preferred by each party is the better one. If the parties cannot agree to any use of ADR, then the status report shall contain a detailed explanation from any party opposed to all forms of ADR which shows why ADR is inappropriate.

DATED at Anchorage, Alaska, this 12th day of December 2003.

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JOHN W. SEDWICK  
UNITED STATES DISTRICT JUDGE